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Supreme Court of the United States

OCTOBER TERM, 1958

No. 893

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, COMMISSIONERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

A petition is here sought for a writ of certiorari to the New York Court of Appeals to review an order of that Court, entered March 13, 1959, which unanimously affirmed, without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on December 9, 1958 (967).* That Court in turn had unanimously affirmed, with an

* Numerals in parenthesis refer to folio numbers in the consolidated record on appeal.

opinion by Bastow, *J.* (985, *et seq.*; and see Petition, Appendix, page 22), an order of the Supreme Court of New York County, entered August 15, 1958 (529). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing petitioner to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting", which had been held in New York at Apalachin, Tioga County. On April 9, 1959, the Court of Appeals amended its remittitur upon petitioner's application so as to define the precise questions considered (Petition, page 2).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August, 1958. In the New York courts the appeals of all seven were consolidated. Petitioner and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date, Joseph Riccobono, one of the other six persons so incarcerated, separately has petitioned this Court for a writ of certiorari to the New York Court of Appeals for review of the affirmance of his order and warrant of commitment. A third, Paul Castellano, separately has filed both a notice of appeal and a petition for a writ of certiorari for review of the New York Court of Appeals' decision affirming his incarceration. An application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission:

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.
>
> "This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission, Leg. Doc. No. 23 (1953), pp. 27-30.*

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

> "Section 2(1)(a) The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*
>
> (b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> (c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in the Appendix to the Petition at page 37, *et seq.*

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Petitioner and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred

to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activites of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by which petitioner and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957; at Apalachin, Tioga County, State of New York.*" (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including petitioner (191, 282, 383, 479, 588). The statement read, in part, as follows:

> *"In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes, were committed or planned at this meeting.
>
> "Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (597).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Petitioner's Conduct Before the Commission.

An individual hearing was held for petitioner before the Commission. A similar pattern of events occurred regarding petitioner and the others during their respective hearings. Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g., 596; 889).

Questions were directed to petitioner by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (600-663). Other than merely identifying himself (601), petitioner refused to answer these questions (602). His refusals were based on his privilege against self-incrimination and numerous other alleged general and technical grounds.

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon petitioner and the others. The Commission's action and the effect of its decision regarding immunity were clearly explained to petitioner, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (619, *et seq.*).

After this instruction the same questions were repeated by the Commission. As did the others, petitioner again refused to make any answer on the basis of several alleged grounds, including the privilege against self-incrimination contained in both the New York and United States Constitutions (635).

On behalf of the Commission the Chairman then specifically directed and ordered petitioner to answer the questions as they were put to him (638, *et seq.*) Petitioner nevertheless persisted in his refusal to answer (639, *et seq.*).

After petitioner had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (663).

The Hearings in the Trial Court.

After petitioner's separate hearing was adjourned by the Commission, pending further proceedings, an order was obtained and served personally on petitioner directing him to appear before Special Term of the Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Petitioner was the fifth recalcitrant witness to be committed after a full hearing at Special Term. Two were committed August 12, and two on August 13. Petitioner was committed on August 15. Each witness who proceeded petitioner had raised the same legal objections that petitioner now raises, and the same judge who committed petitioner had heard and passed upon those arguments (682, *et seq.*, 751, *et seq.*, 793, *et seq.*, 847, *et seq.*). In fact Castellano, one of the four committed before petitioner, was then repre-

sented by petitioner's attorney who made extensive legal argument on the merits of Castellano's commitment (847-885). Before petitioner's judicial hearing the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. The Court stated its findings were based on a study of the transcript. After opportunity for full argument, which petitioner's attorney did not utilize, the Commission's application was granted by the Court and the warrants executed.

Since his commitment, petitioner has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court or to the present, has petitioner given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him petitioner may secure his release pursuant to law (e.g., 529 [order], and 115 [warrant]).

Questions Presented

Does the duty of a state law enforcement agency to apprise federal law enforcement authorities of such violations of federal law as it discovers in the course of its investigations thereby convert the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, a prohibition against action by the national government only, into a prohibition against action by the state

government after immunity has been conferred by the state upon petitioner?

Was the state trial court's refusal to grant petitioner's request for a hearing adjournment such an abuse of its discretion as to deprive petitioner of the due process protections guaranteed by the Fourteenth Amendment to the United States Constitution, where petitioner was offered full opportunity to present argument but chose to waive such opportunity and appear specially, and the state courts have unanimously upheld the manner by which the trial court acted in accordance with the state civil procedure?

* * * *

Petitioner here raises an alleged third issue that "the over-all effects of the proceedings violate due process and constitute cruel and unusual punishment" (Petition, page 19). The Commission is uncertain as to the legal theory so advanced, or the seriousness with which, it is urged, for among other reasons no witness before the Commission since its inception—including petitioner—has complained of the procedure by which the Commission conducted its hearings. Accordingly, no response is made to this specious "question". At best it is no more than a combination of arguments already offered respecting petitioner's federal privilege against self-incrimination and his rejected request for an adjournment—plus some window dressing. In any event petitioner has failed to indicate how this issue was timely raised in the state courts, particularly since it was in no way raised in the trial court or on the first appeal in the New York courts.

ARGUMENT

POINT I

Petitioner's rights under the Fifth Amendment to the United States Constitution were not infringed and cannot be prejudiced by the state proceedings.

Petitioner's rights against compulsory self-incrimination under the Fifth Amendment to the United States Constitution could not have been infringed during the Commission hearings. The Fifth Amendment is a prohibition against the national government only and is inapplicable to the states or state proceedings. *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958); *Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Jack* v. *Kansas*, 199 U. S. 372 (1905); *accord*, *Barron* v. *Baltimore*, 32 U. S. (7 Pet.) 243 (1833). Also, neither the due process clause nor the privileges or immunities clause of the Fourteenth Amendment incorporaties the Fifth Amendment privilege against compulsory self-incrimination so as to make that privilege available during state proceedings. *Twining* v. *New Jersey*, *supra*; *accord*, *Knapp* v. *Schweitzer*, *supra*.

A witness in a New York proceeding has the right to claim his privilege against self-incrimination under the New York Constitution, Article I, Section 6, if he so elects, as did petitioner in this instance. But the conferral of immunity by the State of New York gave protection to petitioner co-extensive with the sole privilege it granted; under such circumstances testimony may be coerced from petitioner by incarceration, and particularly where an official state investi-

gation is directed toward uncovering an event that took place within the borders of New York and petitioner is a New York resident. This is especially true of cases in which a witness has refused absolutely to testify as directed by lawful authority, as petitioner so refused. In such event, New York has done all it can do and, more important, all it has to do through conferring valid immunity under New York law. *Knapp* v. *Schweitzer,* 357 U. S. 371 (1958); *Jack* v. *Kansas,* 199 U. S. 372 (1905). To hold otherwise would, in effect, foreclose any state from ever conferring immunity.

The New York Courts have unanimously sustained the grant of immunity proffered petitioner pursuant to New York law, *Commission of Investigation* v. *Lombardozzi, et al.,* 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept., 1958), *aff'd without opinion* 5 N. Y. 2d 1026 (1959) (this proceeding); *Dunham* v. *Ottinger,* 243 N. Y. 423, 154 N. E. 298 (1926), and petitioner appears to concede the validity in New York of the grant of immunity.

On the same rationale the converse has been established: Only the federal privilege against compulsory self-incrimination is available to a witness during federal proceedings. Once immunity co-extensive with that federal privilege is offered, such witness' testimony may be coerced under penalty of incarceration, notwithstanding resultant exposure to subsequent state prosecution. *United States* v. *Murdock,* 284 U. S. 141 (1931); *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Brown* v. *Walker,* 161 U. S. 591 (1896).

Petitioner claims, however, that these fundamental decisions are irrelevant as there are "unique factors"

in this case which make those decisions inapplicable. This is hardly so, as an examination of the "unique factors" quickly reveals:

1. Petitioner claims that Section 2(5) of the Act establishing the Commission requires the Commission to conduct investigations whose principal purpose is to uncover federal crimes. Section 2(5) reads as follows, in its entirety:

> "The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state."

Fairly read, the section merely requires the Commission to turn over to federal authorities evidence of federal crimes which is discovered incidentally during the course of the Commission's investigations into state matters.

In fact, were Section 2(5) construed as petitioner contends it would be unconstitutional as an improper intrusion of the state into federal affairs. *Accord, Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956); United States Constitution, Amend. X. Hence if there is any ambiguity as to the meaning of this section of a New York statute, and the Commission contends there is none, its interpretation is controlled by the settled doctrine that "where an act is susceptible to two constructions, one of which will make it constitutional and the other unconstitutional, the former will be adopted." I McKinney's Statutes, Section 150 (1942). Furthermore, even assuming petitioner to be correct that Section 2(5) gives the Commission authority to investigate federal crimes as a principal

purpose, the mere existence of such a power is irrelevant to petitioner's case, since there has been not the slightest factual showing that such power was in fact used.

2. Petitioner claims there are vast and somber consequences that must flow from the Commission's statutory duty under Section 2(5) to cooperate with federal prosecuting authorities. The Commission's statutory duty so to cooperate is merely a codification of a duty already incumbent upon every state official by virtue of his oath of office, which includes his pledge to support and defend the Constitution of the United States as well as his state constitution. The duty to cooperate with federal officers was at least implicit in every "two sovereignty" case decided by this Court—and that duty was in each case considered of no consequence.

Petitioner's reliance upon *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), in an effort to bolster his objection to federal-state cooperation, is misplaced. The most petitioner may make of *Knapp* is that the opinion leaves unconsidered the question of whether the use of a state by federal authorities as "an instrumentality of federal prosecution or investigation" (at p. 380) would make the federal privilege applicable to state proceedings. Only a moment's pause is necessary to conclude that "instrumentality" and "cooperation" are vastly different concepts. "Instrumentality" envisions the extreme situation where the state is a mere pawn of federal authorities, and the state proceeding a sham. There has been no showing by petitioner to demonstrate the existence of such a situation nor could there be such a showing. Pages

13 and 14 of his petition, wherein he infers the existence of an "instrumentality" from the "facts" he alleges, is a classical illustration of the *non-sequitur*. The record contains no such facts. Cooperation more significant than the mere language of Section 2(5) of the Commission's act was shown to exist in *Knapp*, and was considered irrelevant. The *Knapp* case suggests a sensible approach to the "instrumentality" problem in the federal context: evidence secured by use of the state as an "instrumentality" will be inadmissible in the federal courts; rather than foreclose the state from acting in the all important exercise of its police powers against a serious problem of law enforcement in the first instance.

3. Petitioner claims the Commission's investigation has placed him in danger of federal prosecution. All that has been said about cooperation is applicable to this "unique factor," since the danger of federal prosecution for reasons unrelated to state action is something less than cooperation. A real danger of prosecution by a second sovereign was implicit in both *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958) and *United States* v. *Murdock*, 284 U. S. 141 (1931), and both considered this factor inconsequential.

Petitioner's real aim is a reversal of *Knapp* v. *Schweitzer, supra*, and the decisions leading up to it. His "unique factors" provide no basis for doing so; indeed their examination illustrates the soundness of *Knapp* and how completely it disposes of petitioner's claims.

POINT II

Petitioner was accorded full due process protection during this proceeding.

The basic requirements of procedural due process are the establishment of jurisdiction and the provision of notice and hearing, *Twining* v. *New Jersey*, 211 U. S. 78 (1908). The only due process question raised by petitioner in this case, is whether the hearing requirement was adequately satisfied. Section 406, he concedes, provides for a hearing. *Matter of Barnes*, 204 N. Y. 108, 97 N. E. 508 (1912). But petitioner complains that the trial court's denial of his request for an adjournment of the hearing which resulted in his incarceration was an abuse of discretion and thereby denied him a fair hearing; this deprivation was so serious, he continues, as to require what amounts to supervisory action by this Court concerning a minute point of state civil procedure already decided adversely to him by several unanimous state courts.

The Commission is confident that a detailed examination of the record will reveal clearly that petitioner had full due process protection throughout this proceeding and that this issue is of such a nature as not to call for action by this Court.

1. Petitioner was fully apprised of the exact subject matter of the investigation by the subpoena served upon him well in advance of the hearing, by the opening statement of the chairman, and by the Commission's resolution authorizing public hearings.

2. Petitioner came to the Commission hearings prepared not to answer any questions put to him concerning the Apalachin meeting. He was accompanied by counsel and fortified with various typewritten sheets containing alternative responses to be given to such inquiries as the Commission might direct to him. The responses set forth detailed and complex legal grounds for refusing to answer and clearly were written by counsel. These prepared answers included an alternative response in the event the Commission conferred immunity upon petitioner—which occurred. No claim of surprise at the Commission's conferral of immunity was made at any time nor in view of the advance preparation could such a claim have been made. The pattern of petitioner's deliberate conduct was set before the hearing even opened.

3. No objection has ever been made by appellant that the questions asked at the hearing were not legal and pertinent.

4. Petitioner was fully apprised, well in advance of his commitment, of all the legal consequences which might follow from the contumacious course of conduct he adopted, including possible commitment under Section 406. Two similarly contumacious witnesses were ordered incarcerated under Section 406 on August 12, 1958; two others on August 13, 1958 (one of whom was represented by petitioner's counsel). Petitioner's counsel was present and observed all proceedings before the Commission and the committing Court on August 12 and 13, and personally argued a bail application to an Appellate Court on these same issues for Castellano on August 14, 1958.

It was not until the next day, August 15th that petitioner had his hearing at Special Term and was ordered incarcerated.

5. The transcript of the proceedings in the trial court discloses that petitioner chose to appear specially, thereby waiving his right to introduce evidence or make legal argument on the merits. Even after counsel's decision to appear specially, the court extended opportunity to introduce evidence and make argument:

> "The Court: Counsel, do you want to make some statement for the record?
>
> "Mr. Brodsky: No, your Honor. Inasmuch as I have appeared specially, I refuse to make any statements." (894).

No specific challenge to the court's jurisdiction was disclosed at that time nor has any been forthcoming since.

6. The Court was well acquainted with the law of petitioner's case, having heard the legal issues argued four times previously. The issues of law raised were simple and readily resolved. That these issues were so resolved, is hardly a deprivation of due process. *Fisher* v. *Pace*, 336 U. S. 155 (1949).

7. The Court stated at appellant's hearing that it had studied the full transcript of the proceedings before the Commission, which was then before the Court. The Court's findings under Section 406 were based on that study. Petitioner raised no material or conflicting issues of *fact*, and for this reason alone his claim of deprivation of due process has no sub-

stance. The short of the matter is that petitioner has no factual "defense" at all, for his case involved only the legal interpretation of extremely simple facts: were you sworn and questioned; did you refuse to answer—all of which were made clear by the transcript.

Moreover, petitioner needed no further time to discover that he had just flatly refused to give any answers to questions about an event of which he has admitted knowledge.

Under these circumstances the courts of New York were correct in finding that the trial court had not so abused its discretion in denying an adjournment as to amount to a deprivation of due process of law. And, too, the decision to grant or deny an adjournment depends upon many variable factors within the peculiar administrative discretion of the trial judge, including the difficulty or simplicity of resolving the issues presented; his assessment of the adequacy of counsel's preparation; his assessment of the usefulness or futility of new research, legal memoranda and further argument, and so on.

Whether the refused adjournment, in the particular case, was an abuse of discretion is not a question of wide applicability but is limited to the facts of this particular case. The courts of New York have unanimously determined there was no abuse of discretion in this instance. No citations are necessary to indicate the settled policy of this Court not to disturb such state determinations as to state procedure, where the issue is of [illegible] limited applicability and almost certainly is confined to unusual circumstances present in the particular case.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

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